83-477

Office Supreme Court, U.S.
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ALEXANDER L. STEVAS,

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EARLE M. JORGENSEN COMPANY, et al
Petitioners,

v.

THE CITY OF SEATTLE, WASHINGTON
Respondent.

On Writ Of Certiorari
To The Supreme Court Of
The State Of Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether §121(a) of The Public Utilities Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. §2631 (a), requires a city council, acting as the rate-making authority for a nonregulated electric utility, to give ratepayers notice of rate proposals when requested; to permit ratepayers to appear, to speak, and to provide expert testimony during consideration of rate proposals; and to permit ratepayers to cross-examine witnesses proposing specific rates, principles of rate allocation, or specific rate designs during a rate proceeding in order to contribute toward achieving the purposes of PURPA?

2. Whether, if 16 U.S.C. §2631(a) is construed to require a nonregulated utility to afford ratepayers the right to intervene and participate, the statute infringes on powers reserved to the States respectively, or to the people, under the Tenth Amendment?

PARTIES TO THE PROCEEDINGS

The Petitioners are eighteen industrial companies and one individual.[1] The Respondent is a municipal corporation operating under the laws of the State of Washington.

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[1] Earle M. Jorgensen Company; Northwestern Glass, a Division of Indian Head, Inc.; Todd Pacific Shipyards Corp.; Issacson Corp.; Ideal Basic Industries, Inc.; Northwestern Steel Rolling Mills, Inc.; Harbor Island Machine Works, Inc.; Washington Iron Works, Inc.; Markey Machinery Co., Inc.; PSF Industries Inc.; Stainless Piping Systems, Inc.; Alaskan Copper Companies, Inc., d/b/a Alaskan Copper & Brass Co. & Alaskan Copper Works; Rainier Brewing Co.; Lockheed Shipbuilding & Construction Co.; Kaiser Cement Corp.; Olympic Foundry Co.; PACCAR, Inc.; Pioneer Enamel Manufacturing Co., Inc.; and John W. Chapman. Bethlehem Steel Corporation was a party to the action below but does not join in this petition.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Washington Supreme Court appears in the Appendix hereto, and is reported at 99 Wn.2d 861, 665 P.2d 1328 (1983). The order of the King County Superior Court granting the City's motion for summary judgment is unreported, and appears in the appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Washington was entered on June 23, 1983. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257.

STATUTORY PROVISION INVOLVED

United States Code, Title 16 §2631(a):

In order to initiate and participate in the consideration of one or more of the standards established by subchapter II of this chapter or other concepts which contribute to the achievement of the purposes of this chapter, the Secretary, any affected electric utility, or any electric consumer of an affected electric utility may intervene and participate as a matter of right in any ratemaking proceeding or other appropriate regulatory proceeding relating to rates or rate design which is conducted by a state regulatory authority (with respect to an electric utility for which it has ratemaking authority) or by a nonregulated electric utility.

CONSTITUTIONAL PROVISION INVOLVED

Tenth Amendment to the United States Constitution:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

The City of Seattle owns and operates a nonregulated electric utility for the benefit of its citizens. It also serves ratepayers beyond the city limits who cannot vote in Seattle city council or mayoral elections. The rates for the utility's electricity are fixed by the city council by ordinance.[2]

The petitioners are 18 industrial ratepayers and one individual ratepayer who asserted their PURPA rights to intervene and participate in Seattle's 1980 rate proceeding pursuant to 16 U.S.C. §2631(a). Specifically, petitioners sought the opportunity to receive notice of specific rate proposals to be considered by the city council, the opportunity to comment on those proposed rates, both individually and

[2] *See generally Puget Sound Power & Light Co. v. Seattle*, 291 U.S. 619, 621 (1934).

and through expert witnesses, the opportunity to make their own proposals for the council's consideration, and the opportunity to cross-examine proponents of various rate proposals.

The mayor of Seattle initiated the 1980 electric rate proceeding by proposing an initial allocation of rate increases among the ratepayer classes on April 23, 1980 (CP 578). A public hearing on this proposal was announced for May 14, 1980 (CP 790). Notice was sent to 1,000 interested parties and was published in local newspapers (CP 514). This proposal contemplated generally uniform increases for all customer classes, residential, commercial and industrial (CP 582).

On May 13, 1980, the mayor submitted an entirely new rate allocation proposal (CP 593) to the city council, raising the proposed increase for the class of industrial ratepayers to whom petitioners belong, from the 42.9% proposed on April 23, 1980 (CP 582) to 117.6% (CP 605). This new proposal was described by a City of Seattle economist as "unprecedented among the nation's electrical utilities" (CP 1060). Although various people protested at the May 14 hearing that they had had insufficient time to comment intelligently on the new proposal, (CPA 43-4) no further public hearings were held on the allocation formula.

On May 27, 1980 the mayor submitted to the city council a rate design proposal which translated the proposed class rate increases into specific rate schedules (CPA 868). The only public hearing on any rate design proposal was held on June 10 (CPA 298). On Friday, June 13, another rate design was proposed by a staff member of the city council, and a written comment deadline of Monday, June 16th was imposed by the council (CPA 426). On June 20, yet another new rate design proposal was submitted by the Seattle City Light Department (CP 889). A deadline for comments on this proposal was set for June 27 (CP 886).

A representative of some of the petitioners protested the

short time allowed for comments and requested the opportunity to provide oral or written comments, to call expert witnesses, and to cross-examine witnesses concerning both the rate allocation and rate design proposals (CP 875, 883, 915). No such opportunity was provided. The rates were subsequently further revised up to the date of final passage. Ordinance 109218 was finally passed by the city council on July 21, 1980, and the specific rates embodied in the ordinance were first made public during the city council meeting on July 21, 1980 (CP 551).

The council also held public hearings, together with proper notice, pursuant to 16 U.S.C. §§2621, 2623, and 2624, on April 15, April 29, May 5 and September 22, 1980 (CP 417). Petitioners did not participate in these hearings, and the council's consideration of these standards was concluded separately from its ratemaking proceeding which resulted in its adoption of 1980 rates (CP 570).

On August 1, 1980, petitioners commenced this action in King County Superior Court, alleging *inter alia* that "[i]n the consideration and passage of Ordinance 109218 Defendant CITY OF SEATTLE unlawfully denied Plaintiff the right to intervene and participate in the ratemaking proceeding as mandated by 16 U.S.C. §2631" (CP 677). The complaint prayed that "Seattle Ordinance 109218 be declared null and void for failure to allow Plaintiff to intervene and participate in the ratemaking proceeding pursuant to 16 U.S.C. Section 2631..." (CP 679).

The Superior Court granted the City's motion for summary judgment as to the PURPA claim on July 29, 1981. Appendix, p. 5a. Petitioners appealed from this judgment to the Washington State Supreme Court, which affirmed the Superior Court. The court concluded that while 16 U.S.C. §2631(a) applied to proceedings other than the city's consideration of PURPA's conservation standards, such application to other proceedings was "limited by the mode of participation provided by the City". Appendix, p. 19a. The

court also declared that 16 U.S.C. §2631(a) did not transform "the nature of every ratemaking proceeding of a nonregulated utility," and that "[s]uch a disruptive right would not facilitate PURPA's purposes." Appendix, p. 18a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IMPAIRS THE ACHIEVEMENT OF THE PURPOSES OF PURPA BY THE ELIMINATION OF RATEPAYER PARTICIPATION IN RATE PROCEEDINGS FOR MOST RATEPAYERS OF WASHINGTON STATE ELECTRIC UTILITIES.

The enormous hydroelectric resources of the Pacific Northwest have long been the subject of federal interest.[3] The allocation of the benefits derived from these resources has frequently pitted various interests within the region against each other.[4]

Although electric power in the Pacific Northwest involves a mix of private, state-regulated and public, nonregulated distribution systems, each state's mix of systems is unique. In Idaho, 13.9% of the market is served by public utilities, and in Oregon, 37.1%. However, in the State of Washington, the public utilities serve 76.6% of the

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[3] *See generally Port of Astoria v. Hodel*, 595 F.2d 467, 471-3, (9th Cir. 1979); *Natural Resources Defense Council, Inc. v. Hodel*, 435 F. Supp. 590, 591-595 (D.Ore.1977), *aff'd sub nom. Natural Resources Defense Council, Inc. v. Munro*, 626 F.2d 134 (9th Cir.1980); Bonneville Project Act, ch.720, 50 Stat. 731 (1937) codified at 16 U.S.C.§832 *et. seq.*; Federal Columbia River Transmission System Act, P.L. 93-454 (1974) 88 Stat. 1376, codified at 16 U.S.C. §838 *et. seq.*; Pacific Northwest Electric Power Planning and Conservation Act., P.L. 96-501 (1980), 94 Stat. 2697, codified at 16 U.S.C. §839 *et. seq.*

[4] *See, e.g., Central Lincoln Peoples' Util. Dist. v. Johnson*, 686 F.2d 708 (9th Cir.1982), *cert. granted sub nom. Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, ___ U.S. ___, 75 L.Ed.2d 928, 103 S.Ct. 1496 (1983).

market.[5] These public utilities are entitled to a preference in the purchase of federally-generated hydroelectric power.[6]

In Washington State, each of these public utilities is presently exempt from regulation by the state utilities and transportation commission, either by virtue of R.C.W. 80.04.500 (municipal utilities) or R.C.W. 54.16.040 (p.u.d.'s). Thus, if the decision below is allowed to stand, three-fourths of the electric consumers of the State of Washington will be denied the right to intervene and to participate in their own rate proceedings, either to raise issues of the applicability of the PURPA standards to their own utility rates, or to raise "other concepts" the consideration of which would further such purposes of PURPA as electrical energy conservation or equitable rates to consumers.

Recently many of these unregulated public utilities entered into an abortive attempt to construct several nuclear power plants. This project was unauthorized,[7] and its failure has spawned what has been characterized as "the largest municipal default in U.S. history."[8] Attempts are being made to hold all the public utility ratepayers in the Pacific Northwest responsible for the default, either through Congressional action,[9] or through court action.[10] If any of these efforts are successful, petitioners and all other ratepayers of Northwest public utilities will be facing enormous additional rate increases, piled on top of predictable rate increases due to inflation and the rising cost of

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[5] LEE, KLEMKA & MARTS, ELECTRIC POWER AND THE FUTURE OF THE PACIFIC NORTHWEST 28 (1980).

[6] 16 U.S.C. §832c. *See generally Central Lincoln Peoples' Util. Dist. v. Johnson, supra*, note 4.

[7] *See Chem. Bank v. Washington Pub. Power Supply Sys.*, 99 Wn.2d 772, 666 P.2d 329 (1983).

[8] Wall St. J., July 26, 1983 at 3, col. 2.

[9] *See* Wall St. J., August 3, 1983 at 5, cols. 1-4.

[10] *See* Wall St. J., August 4, 1983 at 5, cols. 1-6.

energy. These problems should not be "exacerbated by the rate structures employed by most utilities."[11]

II. THE DECISION BELOW IMPAIRS THE IMIMPORTANT CONGRESSIONAL POLICY FAVORING PRIVATE ADVOCACY OF ELECTRIC ENERGY CONSERVATION STANDARDS AND FAIR ELECTRIC RATES.

The Public Utilities Regulatory Policies Act of 1978 (PURPA), was enacted by Congress as "...part of a package of legislation, approved the same day, designed to combat the nationwide energy crisis."[12] The three titles of PURPA share three purposes. They are to encourage:

> (1) conservation of energy supplied by electric utilities;
>
> (2) the optimization of the efficiency of use of facilities and resources by electric utilities; and
>
> (3) equitable rates to electric consumers. 16 U.S.C. §2611.

To achieve these purposes or goals, "Titles I and III direct State utility regulatory commissions and nonregulated utilities to 'consider' the adoption and implementation of specific 'rate design' and regulatory standards."[13]

To enforce consideration of these standards, "... or other concepts which contribute to the achievement of the purposes of this chapter, the Secretary [of Energy], ... or any electric consumer of an affected electric utility may intervene and participate as a matter of right in any ratemaking proceeding or other appropriate regulatory proceeding relating to rates or rate design which is conducted by ... a nonregulated electric utility."[14] The intervention

[11] *FERC v. Mississippi*, 456 U.S. 742, 756 (1982).

[12] *Id.* at 745 (1982).

[13] *Id.* at 746. 16 U.S.C. §2611.

[14] 16 U.S.C.§2631(a).

provisions were included in PURPA by the conference committee "in recognition of the reliance they place on intervention and participation in these proceedings to further the purposes of this title."[15] The conferees intended that both the right of intervention or participation and the phrase "other concepts" be interpreted "broadly", and that "the State regulatory authority or nonregulated utility should provide maximum opportunity under State law to participate in ongoing proceedings."[16]

The Congressional policy of relying on private parties to enforce federal policies is an important one. For instance, in the antitrust field, a principal purpose of the private cause of action is to deter anticompetitive practices,[17] and it constitutes a bulwark of antitrust enforcement.[18] Under PURPA, private enforcement or advocacy is an important element of the Congressional statutory framework where, as noted in *FERC v. Mississippi*, " . . .Congress . . . has failed to provide an alternative regulatory mechanism to police the area in the event of state default."[19]

In spite of this general policy, and of the express language of the Congressional conferees in enacting PURPA, the court below, three judges dissenting, concluded that "[s]uch a disruptive right would not facilitate PURPA's purposes."[20] The court also noted that the phrase, "other concepts" had not been discussed in *FERC v. Mississippi*,[21] and thus attached significance to the fact

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[15] H. R. CONF. REP. NO. 95-1750, 95th Cong., 2nd Sess. 81, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 7797, 7815.

[16] *Id.* at 7816.

[17] *Am. Soc'y. of Mechanical Eng'rs., Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572 (1982).

[18] *Perma Life Mufflers, Inc. v. Int'l. Parts Corp.*, 392 U.S. 134, 139 (1968).

[19] 456 U.S. at 766.

[20] Appendix, p. 18a.

[21] *Id.* n. 1.

that "[n]o members of the Court [in *FERC*] interpreted the right to participate in proceedings considering 'other concepts' as synonymous with an in terrorem right to turn any ratemaking proceeding into an ajudication of any ratepayer's particular agenda."[22]

The dissenting justices below responded that "[s]uch a result is an absurd leap in reasoning."[23] The dissenters further commented that "[t]o vest the right to determine the degree of intervention and participation with the utility or its municipal owner is to let the wolf guard the sheep."[24]

In PURPA, Congress determined to rely on the States' consideration of its standards and other concepts, to accomplish its purpose of equitable rates to consumers.[25] Even though the State of Washington has decided in turn to permit local authorities to fix utility rates, a decision which perhaps results in less than maximal efficiency in setting rates,[26] the important goals of PURPA should not be made to suffer as a result. If private advocacy or enforcement of federal rights can be eliminated merely by noting that such a right is "limited by the mode of participation provided by the City,"[27] this Congressionally created right has very little meaning, and is certainly unavailable to achieve the ends Congress intended.

The right to intervene and participate, or more specifically, the right to notice, to an opportunity to be heard and to conduct cross-examination, in the context of utility rate regulation, can hardly be characterized as "disruptive", ex-

[22] *Id.*

[23] *Id.* p. 22a. (dissenting opinion of Rosellini, J.)

[24] *Id.*

[25] *FERC v. Mississippi, supra* note 11, at 765; 16 U.S.C. §§2611(3), 2631(a).

[26] *See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm.*, ___ U.S. ___, 103 S.Ct. 1905, 1918, 76 L.Ed.2d 1, 17 (1983).

[27] Appendix, p. 19a.

cept in the sense which Congress intended — that it would lead to more equitable rates for consumers. Such "rights" are in reality, the norm.[28]

The complexity and importance of electric rate-making to achieve conservation and rate equity goals has previously been noted by this Court.[29] Ironically, as the Washington Supreme Court noted in a decision involving a regulated utility handed down just two months prior to its decision in this case, "[c]ommentators generally suggest effective public participation in utility regulatory proceedings depends largely on the consumer advocate's ability to employ expert witnesses to testify on behalf of residential consumers in utility proceedings."[30]

It is important that the Congressional reliance on private advocacy of Congressional energy and electric rate policies be preserved. In construing PURPA to require no more from a nonregulated utility than the utility is willing to give, the Washington State Supreme Court has stripped this Congressional policy of any meaning, and the decision below should be reviewed for this reason alone.

Further, the decision of the Washington State Supreme Court would appear to disallow even the intervention and participation right of the U.S. Secretary of Energy in rate proceedings of nonregulated electric utilities. As a result, nonregulated utilities in the State of Washington may set rates without any heed to those seeking conservation of energy, efficient use of facilities and resources, or equitable electric rates. Congress cannot have intended such a result, and this Court should review the decision below to consider the issue.

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[28] *See, e.g., FERC v. Mississippi, supra* note 11, at 768-9.

[29] *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*, 447 U.S. 557, 568-69 (1980).

[30] *Power v. Washington Water Power Co.*, 99 Wn.2d 289, 294, 662 P.2d 374, 377 (1983).

APPLICABILITY OF 28 U.S.C. §2403(a)

Because applying 16 U.S.C. §2631(a) to municipal rate-making could arguably draw into question the constitutionality of that provision under the Tenth Amendment to the United States Constitution, 28 U.S.C. §2403(a) may be applicable, and a copy of this petition has been served upon the Solicitor General of the United States.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Washington State Supreme Court.

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APPENDIX

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

EARLE M. JORGENSEN CO., et al.,

Plaintiffs, NO. 80-2-11730-1

v.

CITY OF SEATTLE, a municipal corporation,

Defendant.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

THIS MATTER came on regularly before the Honorable Lee Kraft, Judge of the above-entitled Court, on April 20 and 21, 1981, upon Defendant's Motion for Partial Summary Judgment pursuant to CR 56; and the Plaintiffs motion for reconsideration having come on for hearing on July 15, 1981; the Defendant being represented by William H. Patton and Jeannette Pfotenhauer, Assistant City Attorneys, and the Plaintiffs being represented by J. Jeffrey Dudley of Cartano, Botzer, Larson and Birkholz, Elaine L. Spencer of Bogle and Gates, and Edmund J. Wood. The Court examined and considered the following pleadings, affidavits, and other matters placed on file:

COURT FILE NO.	DOCUMENT
3	Amended Complaint for Declaratory Judgment Against Unjust, Unreasonable and Discriminatory Electric Rates and for Damages
6	Defendant City of Seattle's Answer to Amended Complaint
10	Affidavit of J. Jeffrey Dudley in Support of Motion for Order Approving Escrow of Disputed Funds and Restraining Termination of Electric Service

16 Affidavit of Francis Schmidt in Opposition for Order Approving Escrow of Disputed Funds and Restraining Termination of Electric Service

19 Supplemental Affidavit of J. Jeffery Dudley

22 Elements of Plaintiffs' Case

26 Elements of Defendant's Case

32 Findings of Fact and Conclusions of Law on Plaintiffs' Motion for Order Approving Escrow of Disputed Funds and Restraining Termination of Electric Service

33 Order Denying Plaintiffs' Motion for Order Approving Escrow of Disputed Funds and Restraining Termination of Electric Service

34 Plaintiffs' First Interrogatories to Defendant

35 12-23-80 Letter to Patton from Dudley, re: Blanket Protests for Plaintiffs

37 City of Seattle's Motion for Partial Summary Judgment

38 Brief in Support of the City of Seattle's Motion for Partial Summary Judgment

39 Affidavit of Rud Okeson in Support of Motion for Partial Judgment

40 Luedtke Affidavit Volume 1 of 2

41 Luedtke Affidavit Volume 2 of 2

42 Affidavit of Edmund J. Wood

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44 Affidavit of Robert Gogerty

45 Affidavit of Don Stark

46 Supplemental Affidavit of Luedtke

47 Affidavits of Plaintiffs

48	Affidavit of Charles Nohavec
49	Affidavit of Daniel J. Reed
50	Plaintiffs' Brief in Opposition to Summary Judgment
51	Plaintiffs' Brief in Opposition to Summary Judgment Part II
51.5	Affidavit of Robert Kemp
57	Supplemental Brief in Support of the City of Seattle's Motion for Summary Judgment
58	Plaintiffs' Designation of Important Documents and Transcripts in Opposition to Motion for Partial Summary Judgment
59	Supplemental Affidavit of Edmund J. Wood
73	Answers to Defendant's First Set of Interrogatories to Plaintiffs, Questions 1 through 23
76	Second Amended Complaint for Declaratory Judgment Against Unjust, Unreasonable and Discriminatory Electric Rates and for Damages
77	Plaintiffs' Response to City's Supplemental Brief
77.5	Transmittal of Case Bearing Upon Defendant's Motion for Summary Judgment
79	Affidavit of Daniel J. Reed in Opposition to City of Seattle's Motion for Protective Order
86	Defendant City of Seattle's Answer to Plaintiffs' Second Amended Complaint for Declaratory Judgment and Damages
102	Affidavit of J. Jeffrey Dudley in Response to City of Seattle's Motion to enforce Protective Order
	Affidavit of George P. Gaw in Opposition to Mo-

tion for Order Approving Escrow of Disputed Funds and Restraining Termination of Electric Service, dated October 20, 1980

Affidavit of Virginia L. Sharp in Opposition to Motion for Order Approving Escrow of Disputed Funds and Restraining Termination of Electric Service, dated October 20, 1980

Affidavit of J. Jeffrey Dudley on Documents Discovered in City Light's files.

Affidavit of Donald E. Stark on Documents Discovered in City Annexation Files

Having heard argument of counsel; and the Court having found that Defendant, The City of Seattle, is entitled to an Order Granting Partial Summary Judgment; and the Court having further found that the Plaintiffs' Motion for Reconsideration should be denied; Now, Therefore

IT IS HEREBY ORDERED:

1. Defendant's Motion for Summary Judgment with regard to Paragraph 3.3 of Plaintiffs' Second Amended Complaint ("DEFENDANT CITY OF SEATTLE ACTED ARBITRARILY AND CAPRICIOUSLY IN THE CONSIDERATION AND PASSAGE OF ORDINANCE NO. 109218") is denied.

2. Defendant's Motion for Summary Judgment with regard to the Second Claim of Plaintiffs' Second Amended Complaint ("PLAINTIFFS' DENIED DUE PROCESS") is granted.

3. Defendant's Motion for Summary Judgment with regard to the Third Claim of Plaintiffs' Second Amended Complaint ("DELEGATION OF RATE SETTING AUTHORITY IS UNCONSTITUTIONAL") is granted.

4. Defendant's Motion for Summary Judgment with regard to the Fourth Claim of Plaintiffs' Second Amended Complaint ("VIOLATION OF APPEARANCE OF FAIRNESS DOCTRINE") is granted.

5. Defendant's Motion for Summary Judgment with regard to the Fifth Claim of Plaintiffs' Second Amended Complaint ("CONSUMERS OUTSIDE CITY LIMITS DENIED DUE PROCESS") is granted.

6. Defendant's Motion for Summary Judgment with regard to the Sixth Claim of Plaintiffs' Second Amended Complaint ("UNLAWFUL DENIAL OF INTERVENTION AND PARTICIPATION GUARANTEED BY 16 U.S.C. § 2631") is granted, and Plaintiffs may move to amend the complaint at a later time, with respect to this Claim.

7. Defendant's Motion for Summary Judgment with regard to the Seventh Claim of Plaintiffs' Second Amended Complaint ("PASSAGE OF ORDINANCE VIOLATES CITY'S ADMINISTRATIVE CODE") is granted.

8. Defendant's Motion for Summary Judgment with regard to the Eighth Claim of Plaintiffs' Second Amended Complaint ("ORDINANCE ALTERS RATES PRIOR TO ITS EFFECTIVE DATE") is denied.

IT IS FURTHER ORDERED that the Court has determined there is no just reason for delay and expressly directs that its Order Granting Defendant's Motion for Summary Judgment with regard to the Second, Third, Fourth, Fifth, Sixth and Seventh Claims of Plaintiffs' Second Amended Complaint, be a Final Judgment.

DONE IN OPEN COURT this 29th day of July, 1981.

LEE KRAFT, JUDGE

Presented by:

EDMUND J. WOOD
Of Attorneys for Plaintiffs

Approved as to form and
Notice of Presentation Waived:

William H. Patton
of Attorneys for Defendant

SUPREME COURT
OF THE STATE OF WASHINGTON

EARLE M. JORGENSEN COMPANY, ET AL, *Appellants*,
v. THE CITY OF SEATTLE, *Respondent*.

[1] **Municipal Corporations — Utility Services — Rate Setting — Nature of Act — Due Process.** A municipality's setting of utility rates is a legislative act. Nonresident as well as resident ratepayers' due process rights are limited to the rates not being arbitrary; they are not entitled to further procedural safeguards such as notice, an opportunity to comment, application of the appearance of fairness doctrine, or the right of cross examination.

[2] **Constitutional Law — Delegation of Powers — Validity — Factors.** The fact that a statutory delegation of power to local governments provides no procedural safeguards does not necessarily render the delegation invalid. A court will determine the validity of the delegation by evaluating the entire decisionmaking process,

including whether the decisionmaking body is composed of elected officials, the level of safeguards provided by the decisionmaking body and other statutes, and the ability of the courts to set aside arbitrary or discriminatory decisions.

[3] **Municipal Corporations — Utility Services — Rate Setting — Delegation of Powers — Validity.** RCW 35.92.050, which authorizes municipalities to set rates for electricity which they sell, constitutes a valid delegation of legislative authority.

[4] **Utility Services — Rate Setting — Nonregulated Electric Utilities — Ratepayer Intervention — Scope of Federal Right.** The intervention and participation rights granted to ratepayers of nonregulated electric utilities by the Public Utility Regulatory Policies Act (16 U.S.C. § 2631(a)) apply only to proceedings in which mandatory federal standards for rate setting are considered.

[5] **Administrative Law and Procedure — Administrative Rules — What Constitutes — Limiting Construction.** A broad and nonexhaustive legislative definition of a "rule" will be given a commonsense limiting construction to conform with the enacting body's intent.

ROSELLINI, J., WILLIAMS, C.J., and DORE, J., dissent by separate opinion.

Nature of Action: Municipal utility customers challenged an electrical rate increase on due process and statutory grounds.

Superior Court: The Superior Court for King County, No. 80-2-11730-1, Lee Kraft, J., granted a partial summary judgment in favor of the defendant city on July 29, 1981.

Supreme Court: Holding that the rate setting was a legislative act which complied with due process requirements, that the Legislature's delegation of rate-setting authority was valid, that federal intervention and participation rights were not applicable, and that municipal rulemaking requirements did not apply, the court *affirms* the judgment.

Edmund J. Wood, Cartano, Botzer, Larson & Birkholz, J. Jeffrey Dudley, Bogle & Gates, and *Elaine Spencer,* for appellants.

Douglas N. Jewett, City Attorney, and *William H. Patton* and *Ricardo Cruz, Assistants*, for respondent.

UTTER, J.—This is a challenge of Seattle's 1980 adoption of an electrical rate increase. We reject appellants' various constitutional and statutory claims and affirm the trial court's order of summary judgment.

Appellants sought to set aside the electrical rates set by respondent City of Seattle (City) on July 21, 1980. Appellants are 19 industrial companies and one individual who purchase electricity from the City, located both within and without the Seattle city limits. The new rates increased the cost of electricity to 15 of the appellants by an average 88 percent.

In May 1978, the City, responding to an increase in power costs, formed a Citizens' Rate Advisory Committee (CRAC), which included representatives of appellants, to prepare recommendations concerning rate setting. The CRAC had 60 full committee meetings between May 1978 and July 31, 1980, in furtherance of its role in advising the City on electrical rate structure.

On April 23, 1980, Mayor Charles Royer submitted to the City Council an allocation proposal calling for roughly equal rate increases for all consumer classes. The City Council energy committee scheduled a public hearing for May 14 to obtain comments on this proposal.

On April 29 and May 5, the energy committee held public hearings to discuss electric rate assistance policies, finance policies, and Seattle City Light's revenue requirements. For these as well as other public hearings held by the Council, notice was sent to 1,000 interested parties and was published in the local newspapers.

On May 13, the day before the rate allocation public hearing, Mayor Royer submitted a new allocation proposal calling for increases of 35 percent for residential users, 27 percent for commercial users, and 82 percent for industrial users. Although various people protested at the May 14 hearing that they had had insufficient time to comment

intelligently on the new proposal, no further hearings on the allocation formula were held. Instead, members of the energy committee held private meetings and informal "working sessions" with various people, including representatives of appellants, to discuss the allocation model. On June 9, the City Council approved the allocation model.

Meanwhile, on May 27, 1980, Mayor Royer had submitted to the Council a rate design proposal. A public hearing on this proposal was held on June 10. On June 20, a new rate design proposal was submitted by Seattle City Light at the request of Council member Randy Revelle, chairman of the energy committee. A deadline for comments on this proposal was set for June 27. Again, some of the appellants protested the short time allowed for comments and requested the opportunity to call and to cross-examine witnesses. No such opportunity was provided. The rates were subsequently further revised up to the day of final passage. They were finally passed by the Council as ordinance 109218 on July 21, 1980.

Appellants brought suit to have the rates set aside and for a refund of payments. They alleged: (1) the rates were unfair, unjust, and unreasonable in violation of RCW 80.28.010; (2) appellants had been denied due process; (3) appellants had been denied the rights to intervene and participate in the rate proceedings provided by the Public Utility Regulatory Policies Act (PURPA); and (4) the rates were unlawfully made retroactively effective. The court granted partial summary judgment for the City on claims 2 and 3. It found no just reason for delay and ordered immediate entry of judgment on these claims. That is the judgment challenged in this appeal.

On December 16, 1981, the trial court entered judgment in favor of the City on the claims that were not resolved through the court's earlier order of partial summary judgment. The court held the City did not act arbitrarily or capriciously in enacting ordinance 109218, that the rates were not unfair, unjust or unreasonable, and that the methodology employed by the City in establishing the rate

increase was not fundamentally erroneous. Apparently, neither party plans to appeal this judgment.

I

Appellants first raise a number of claims founded upon a due process interest in meaningful participation in the setting of electric rates. The kind of process which renders participation meaningful depends on the kind of decision being made. Thus, appellants' due process claims ultimately depend on whether we characterize the Seattle City Council's decisionmaking process in setting electrical rates as legislative or administrative (and if administrative—whether its function is legislative or adjudicative).

Appellants urge us to adopt a functional analysis of whether the Council's action is legislative or administrative. We have embraced this functional approach in the past, *Westside Hilltop Survival Comm. v. King Cy.*, 96 Wn.2d 171, 634 P.2d 862 (1981), and are not bound by who makes the decision (*e.g.*, a legislative body) or the form the decision takes (*e.g.*, ordinance) in determining the decision's character.

In arguing the setting of electrical rates is administrative, appellants rely on case law dealing with whether certain matters are subject to referendum. *See, e.g., Leonard v. Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976). All these cases in turn rely on 5 E. McQuillin, *Municipal Corporations* § 16.55 (3d ed. 1969) which identifies the factors by which to distinguish legislative from administrative acts in this context:

> Actions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subjects of a temporary and special character are regarded as administrative. . . .
>
> The test of what is a legislative and what is an administrative proposition, with respect to the initiative or referendum, has further been said to be whether the proposition is one to make new law or to execute law already in existence. The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely

> pursues a plan already adopted by the legislative body itself, or some power superior to it.

(Footnote omitted.) Appellants also point to the apparent anomaly of *State ex rel. Haas v. Pomeroy*, 50 Wn.2d 23, 308 P.2d 684 (1957), a referendum case in which the City's bond council argued and the court found convincing (though it did not rely on) the position that the City's rate setting powers are administrative.

There are two problems with appellants' reliance on the referenda case law. First, analysis of the legislative/administrative distinction with respect to powers of referenda is not the same analysis relevant to the procedural safeguards that must inhere in administrative as opposed to legislative action. When a court determines that an action is administrative and thus not subject to referendum, it does not hold such administrative action is subject to greater procedural safeguards than acts subject to referendum. Quite the contrary, courts deny referenda with respect to administrative acts because of the broad discretion attached to such acts.

[1] We rely on a more germane body of case law, which specifically holds a municipality's setting of rates is a legislative act. *Springfield Gas & Elec. Co. v. Springfield*, 257 U.S. 66, 70, 66 L. Ed. 131, 42 S. Ct. 24 (1921); *Connett v. Jerseyville*, 110 F.2d 1015 (7th Cir. 1940); *Algoma v. Public Serv. Comm'n*, 91 Wis. 2d 252, 283 N.W.2d 261 (1978); *Apartment & Office Bldg. Ass'n v. District of Columbia*, 415 A.2d 797 (D.C. App. 1980); *Fort Collins Motor Homes, Inc. v. Fort Collins*, 30 Colo. App. 445, 496 P.2d 1074 (1972); C. Rhyne, *Local Government Operations* § 23.14 (1980); 12 E. McQuillin, *Municipal Corporations* § 35.37 (Supp. 1981). Courts have found no contradiction in finding such acts legislative yet not subject to the referendum process. *In re Initiative Petitions*, 534 P.2d 3 (Okla 1975); *Aurora v. Zwerdlinger*, 194 Colo. 192, 571 P.2d 1074 (1977). We, too, have held the setting of rates is a legislative act. *Scott Paper Co. v. Anacortes*, 90 Wn.2d 19, 28, 578 P.2d 1292 (1978).

Appellants' second problem is that they wrongly assimi-

late "administrative" with "quasi-judicial." While administrative adjudications require many procedural safeguards, the same is not true with respect to administrative policymaking functions. Appellants concede some aspects of rate setting involve policymaking, but they claim the revenue allocation among customer classes and the design of the actual rates are adversarial processes, which, though stemming from legislative authority, should be characterized as quasi judicial. While it is true the setting of electrical rates involves weighing individual factors, it can hardly be said, as it can be in the rezoning context, that the final decision is for A and against B. Both A's and B's interests must be considered in rendering the final balance, but the ultimate consideration of the Council is what balance of *all* the ratepayers' interests best serves the community. All legislative acts may be subdivided into a series of adversarial contests, but that does not make such acts quasi judicial. *See Harris v. Hornbaker*, 98 Wn.2d 650, 658 P.2d 1219 (1983). If we were to characterize rate setting as quasi judicial, it would be so not only for ratepayers with the highest costs, but for all ratepayers. Every ratepayer would be entitled to notice and the procedural safeguards that accompany quasi-judicial decisions.

While ratemaking may have an administrative aspect, even under a functional analysis, that aspect is not quasi judicial. We have consistently held rate setting is a legislative act, even with respect to rate allocation and design. *See Phinney Bay Water Dist. v. Bremerton*, 58 Wn.2d 298, 362 P.2d 358 (1961); *Faxe v. Grandview*, 48 Wn.2d 342, 294 P.2d 402 (1956).

This conclusion dispenses with appellants' broadest due process claims. The appearance of fairness doctrine, under any interpretation we have given it, applies only in a quasi-judicial context. The right of cross examination, a component of that doctrine, is similarly applicable only in a quasi-judicial context.

Appellants' remaining due process claims relate to failure of notice and an opportunity to comment. Generally, we

have not imposed procedural requirements upon legislative decisions. In reviewing ratemaking decisions of legislative bodies, we have looked only to whether the rates were fair (*i.e.*, reasonable, nondiscriminatory, not arbitrary or capricious). *See Faxe v. Grandview, supra; Phinney Bay Water Dist. v. Bremerton, supra.*

One of the reasons for such judicial deference is the public accountability of elected officials. *Snohomish Cy. PUD 1 v. Broadview Television Co.*, 91 Wn.2d 3, 9, 586 P.2d 851 (1978). Appellants argue such deference should be abandoned as to nonresident ratepayers who were denied a meaningful opportunity to participate in the ratemaking process. At least as to them, the City Council is not accountable through the electoral process. Nonetheless, we have held in a similar context that nonresidents' constitutional rights were not violated by delegation of legislative authority to set water rates to a city council when such delegation occurred with sufficient procedural safeguards. *King Cy. Water Dist. 54 v. King Cy. Boundary Review Bd.*, 87 Wn.2d 536, 546, 554 P.2d 1060 (1976). Implicitly, the court's holding on unlawful delegation included a finding of procedural due process to nonresidents.

Since ratemaking is a legislative act, appellants' only due process right is in nonarbitrary rates. The City has prevailed on that issue in a separate action. To the extent there is any merit to providing procedural safeguards to insure the City's rate setting is not arbitrary, the question is more appropriately discussed under appellants' next claim addressing unlawful delegation.

II

RCW 35.92.050 grants municipalities "full authority" to regulate the price of power sold by them. Municipal utilities are exempted from the control of the Utilities and Transportation Commission. RCW 80.04.500. Appellants assert that this delegation of rate-setting authority is improper insofar as it does not provide for sufficient procedural protections. This argument is based on *Barry &*

Barry, Inc. v. Department of Motor Vehicles, 81 Wn.2d 155, 159, 500 P.2d 540 (1972) in which this court held that legislative power may be delegated to administrative agencies only where "*procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power.*"

Respondent argues it is not subject to the *Barry* delegation standard since ratemaking is a legislative act and the delegation doctrine applies to administrative bodies. Respondent is correct in asserting that our unlawful delegation doctrine has usually been applied in the context of legislative delegation to nonelective administrative bodies. The City Council is an elected body and the setting of electric rates is a local concern. As a leading commentator has stated:

> The general doctrine prohibiting the delegation of legislative authority does not preclude the legislature from vesting municipal corporations with certain powers as to matters purely of local concern.

2 E. McQuillin, *Municipal Corporations* § 4.13, at 33 (3d ed. 1979).

> The fixing of rates to be charged by a lighting plant owned and operated by the municipality has been held a "municipal function," within the meaning of such words as used in this constitutional provision.

2 E. McQuillin, supra § 4.11, at 27.

[2, 3] Nonetheless, the unlawful delegation doctrine has been applied to legislative delegation of its powers to elected officials, *Yelle v. Bishop*, 55 Wn.2d 286, 347 P.2d 1081 (1959) (delegation to Governor), and to local legislative bodies. *See Miller v. Tacoma*, 61 Wn.2d 374, 378 P.2d 464 (1963) (city council authorized to determine existence of blighted areas under urban renewal laws); *King Cy. Water Dist. 54 v. King Cy. Boundary Review Bd., supra* (city council delegated power to set water rates). The Seattle City Council is an elected body but it still serves as the agent of the Legislature in setting electrical rates. In *King Cy. Water Dist.* we indicated the city council was

agent of the Legislature in setting water rates and was subject to the delegation doctrine, at least insofar as its decisions affected nonresidents. Yet the character of the decision was the same as to residents and nonresidents. That the decisionmaking body is elective as to most of those its rate-setting decision affects is simply one of the factors to weigh in determining if adequate procedural safeguards exist for the delegation of legislative power.

In *King Cy. Water Dist.*, the court found adequate procedural safeguards for delegation. Those safeguards consisted of: (1) statutory standards for water rates; (2) comprehensive regulation of water system financing by RCW 35.92.070 *et seq.*; (3) judicial power to set aside discriminatory, arbitrary, and unreasonable rates; and (4) the right of nonresidents to "attend and participate in public meetings of the city council. RCW 35.24.180." 87 Wn.2d at 546.

Appellants argue that since RCW 35.92.050 (authorizing the City to set electric rates) provides no procedural safeguards, it is unconstitutional. Appellants' focus is too narrow. Procedural safeguards need not inhere in the statute itself. If the statutory delegation provides inadequate guidelines, the procedural safeguards may be provided by the administrative body. *See Yakima Cy. Clean Air Auth. v. Glascam Builders, Inc.*, 85 Wn.2d 255, 534 P.2d 33 (1975); *State ex rel. Standard Mining & Dev. Corp. v. Auburn*, 82 Wn.2d 321, 510 P.2d 647 (1973); *Barry & Barry, Inc. v. Department of Motor Vehicles, supra*; K. Davis, *Administrative Law* § 3:3 (Supp. 1981).

Looking at the entire decisionmaking process, we must conclude adequate procedural safeguards exist. Just as there must be uniformity of standards for water rates under RCW 35.92.010, so must electrical rates be just and reasonable and nondiscriminatory under RCW 80.28.090, .100. The comprehensive regulation of financing under RCW 35.92.070 applies equally to water and electric utilities. As with water rates, courts may set aside arbitrary or discriminatory electrical rates. Furthermore, notice must be pro-

vided for public meetings of the City Council under Seattle City Charter, art. 4, § 6. The public's right to participate is no greater under RCW 35.24.180 (regarding water rates) than under the City's charter. In addition to these comparable procedural safeguards, the City created CRAC, which met 60 times in its advisory capacity. Some of appellants were represented on CRAC. Finally, the Congress has imposed other procedural safeguards through PURPA, including evidentiary hearings, which the City must comply with in its own ratemaking process. Taken as a whole, considerable safeguards are provided. We conclude the delegation of RCW 35.92.050 is lawful.

III

Appellants next claim they were denied a right to "intervene and participate" pursuant to 16 U.S.C. § 2631(a) (Supp. 2, 1978). That section provides:

> In order to initiate and participate in the consideration of one or more of the standards established by subchapter II of this chapter or other concepts which contribute to the achievement of the purposes of this chapter . . . any electric consumer of an affected electric utility may intervene and participate as a matter of right in any ratemaking proceeding or other appropriate regulatory proceeding relating to rates or rate design which is conducted by . . . a nonregulated electric utility.

The City is a "nonregulated electric utility." Subchapter 2 specifies standards that utilities are required to consider in rate setting, although not necessarily to implement. Subchapter 2 also requires hearings on certain specific subjects which provide for notice, consent and findings. Such hearings were conducted by the City.

The City argues section 2631's right to intervene is limited to the hearings it was required to hold under subchapter 2 and in which appellants chose not to participate. However, the House Conference Report on this section indicates:

> [T]his section creates a Federal right of participation and intervention in rate-making proceedings or other appro-

priate regulatory proceedings conducted by . . . a non-regulated electric utility. . . .

. . . The conferees intend for the term intervention to be interpreted broadly to include intervention or participation at the beginning of a proceeding or otherwise but do not intend for such term to connote a right to initiate a proceeding.

The conferees intend that the phrase "other concepts which contribute to the achievement of the purposes of this title" be construed broadly so that no one will have to prove his case in advance before being allowed to intervene. Any issue which may contribute to the purposes of the title should be given consideration if it may contribute to these purposes.

H.R. Rep. No. 1750, 95th Cong., 2d Sess. 81–82, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7797, 7815–16. The legislative history thus indicates the right of intervention and participation exists in *any* proceeding.

[4] At the same time, the conferees noted, at page 7816, "The procedures for the type of intervention are left to State law", thus leaving the plenary right of intervention limited by the nature of participation afforded under the City's ratemaking procedures. We do not interpret PURPA's right of intervention as a right that confers a full panoply of adjudicative safeguards. Nor do we feel the United States Supreme Court's recent opinion upholding the statute against constitutional attack, *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982), supports appellants' broad interpretation of its intervention and participation rights under section 2631. The Court upheld both PURPA's substantive requirement that utilities "consider" various ratemaking standards and "certain notice and comment procedures when acting on [those] federal standards." 456 U.S. at 770. While finding the notice and comment procedures more intrusive than the federal mandate to "consider" the proposed standards, the Court nevertheless held, at page 771:

If Congress can require a state administrative body to

consider proposed regulations as a condition to its continued involvement in a pre-emptible field—and we hold today that it can—there is nothing unconstitutional about Congress' requiring certain procedural minima as that body goes about undertaking its tasks.

The notice and comment procedures to which the Court referred are the specific procedures for notice, hearing and findings under sections 2621 and 2623 of the act, as well as the evidentiary hearings required by the act. *See* 16 U.S.C. § 2624(b) (Supp. 2, 1978). The City complied with these provisions. In accordance with section 2624, the City held an evidentiary hearing on lifeline rates on April 15, 1980. On April 29 and May 5, the City held public hearings in accordance with section 2621 to consider the section's proposed standards. And on September 22, 1980, the City held a public hearing pursuant to section 2623 with respect to adoption of certain other federal standards. Appellants did not participate in any of these procedures.

If section 2631 had been meant to confer adjudicatory safeguards in *any* proceeding of the ratemaking authority concerning *any* subject, the United States Supreme Court would have been obliged to address such usurpation of state law in that portion of its opinion. It did not, nor is there any indication the Court felt section 2631 transformed the nature of every ratemaking proceeding of a nonregulated utility. Such a disruptive right would not facilitate PURPA's purposes.[1] The City complied with the specific procedural requirements of sections 2621, 2623 and 2624. It provided notice and public hearings and published its findings with respect to consideration and adoption of specific federal standards, and it held evidentiary hearings where required. Appellants' right of intervention and par-

[1]The entire Court (including Justice Powell in concurrence and Justice O'Connor in dissent) discussed section 2631's right of intervention as relating only to ratemaking proceedings in which the federal standards are considered. No members of the Court interpreted the right to participate in proceedings considering "other concepts" as synonymous with an in terrorem right to turn any ratemaking proceeding into an adjudication of any ratepayer's particular agenda.

ticipation in all other proceedings of the Council were limited by the mode of participation provided by the City.

IV

[5] Finally, appellants argue the City's ratemaking is rulemaking under the Seattle Administrative Code, ch. 3.02. Seattle Municipal Code (SMC) 3.02.020(A) states:

> A. "Agency" means The City of Seattle or any of its subdivisions including but not limited to, any city board, commission, committee, officer or department, including the City Council and its committees, when acting in accordance with or pursuant to authorization by ordinance or Charter to make rules, hear appeals, or adjudicate contested cases.

The code defines "rule" as

> any agency order, directive, or regulation of future effect, including amendment or repeal of a prior rule, which applies generally and which, if violated, subjects a person to a penalty or administrative sanction, including, but not limited to, an order, directive, or regulation which affects:
>
> . . .
>
> 4. Any qualification or requirement relating to the enjoyment of benefits of privileges conferred by law.

SMC 3.02.020(E). The City Council is subject to the City's administrative code and the provision defining "rule" is both broad and nonexhaustive. We might easily include the setting of electrical rates within the Council's rulemaking capacity since those rates have "future effect." But then so does most everything the Council does in its legislative capacity. It is simply because the definition of "rule" is so sweeping that we must place commonsense limits on it. Setting rates in the form of an ordinance does not exempt it from the City's administrative code, but we do not feel the City intended such ordinance to be an "order, directive or regulation" constituting a rule under the code. Nor do we feel the determination of electric rates is a "penalty or administrative sanction." Finally, even if rate setting were a rule within the code, the City would have been empowered to limit public participation to written presentations.

Appellants seek more. Neither the City's administrative code nor the other bases proffered by appellants affords them what they seek.

The trial court's order of summary judgment is affirmed.

STAFFORD, BRACHTENBACH, DOLLIVER, DIMMICK, and PEARSON, JJ., concur.

ROSELLINI, J. (dissenting)—The majority holds that the procedures afforded the public in this case are adequate to protect their interests in electric rate setting. Although I agree with the constitutional and statutory analysis contained in parts I and II of its opinion, I cannot agree with the majority's conclusions concerning the application of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 2631 (Supp. 2, 1978) or the Seattle Administrative Code, ch. 3.02. I therefore dissent.

As recognized by the majority, PURPA grants any electric consumer the right to intervene and participate in ratemaking proceedings. 16 U.S.C. § 2631(a). The majority asserts, however, that this right is limited to participation in the consideration of which standards utilities are required to consider in rate setting rather than participation in the actual ratemaking proceeding. I disagree. Such a result is consistent with neither the clear language of PURPA nor the legislative purpose behind its enactment. A close examination of the section relied upon by the majority demonstrates this fact. Section 2631(a) states:

> In order to initiate and participate in the consideration of one or more of the standards established by subchapter II of this chapter *or other concepts which contribute to the achievement of the purposes of this chapter*, . . . any electric consumer of an affected electric utility may intervene and participate as a matter of right in *any* ratemaking proceeding or other appropriate regulatory proceeding relating to rates or rate design which is conducted by . . . a nonregulated electric utility.

(Italics mine.)

The majority's interpretation of this section focuses on

the first part of clause 1, *i.e.*, "in the consideration of one or more of the standards established by subchapter II of this chapter". But in doing so it ignores language in the second half of that clause. That language grants the right to participate in the consideration of "other concepts which contribute to the achievement of the purposes of this chapter". This language sweeps more broadly than suggested by the majority. When that phrase is recognized and read in light of the section's later reference to a right to "intervene and participate as a matter of right in *any* ratemaking proceeding", the opposite conclusion must be reached. (Italics mine.) The majority also relies upon *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982) as authority for the proposition that the phrase "any ratemaking proceeding" means selective ratemaking proceedings. The majority contends that the United States Supreme Court would have had to address the issue of usurpation of state law if the section were so read. The majority's reasoning assumes that the court would reach an issue that was not directly before the court. Such an assumption is unsound. In addition, the PURPA's grant of intervention would survive constitutional challenge because the extent of that intervention is defined by state law. Because the majority misinterprets this section, its reliance is misplaced. For instance, the majority quotes the House Conference Report's statement that "'[t]he procedures for the type of intervention are left to State law'". Majority opinion, at 872 (quoting H.R. Rep. No. 1750, 95th Cong., 2d Sess. 81–82, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7797, at 7816). The majority takes this deference to state law and equates it with deference to the City's procedures. Consequently, the majority declares "the plenary right of intervention [is] limited by the nature of participation afforded under the City's ratemaking procedures", (majority opinion, at 872) and "[a]ppellants' right of intervention and participation in all other proceedings of the Council were limited by the mode of participation provided by the City." Majority opinion, at

873. Such a result is an absurd leap in reasoning. Deference to state law means just that, state law. Nothing in PURPA justifies the majority's substitution of City of Seattle law for state law. To vest the right to determine the degree of intervention and participation with the utility or its municipal owner is to let the wolf guard the sheep. Neither section 2631(a) nor *Federal Energy Regulatory Comm'n v. Mississippi, supra,* justifies the majority's analysis.

Lastly, the limited right of intervention and participation contemplated by the majority neglects legislative history that clearly establishes that this section should be interpreted broadly. The section quoted by the majority demonstrates this point. See majority opinion, at 871–72.

Having established that the right of intervention is to be determined by state law, the next question is what state law? I suggest the best resolution lies in this court requiring that the City of Seattle follow its administrative code in these proceedings. Such a result is consistent both with present state law and the goals of PURPA. The majority admits the Seattle Administrative Code could easily be interpreted to apply to the case at hand but implicitly asserts that such an interpretation exceeds the commonsense limits. I disagree.

Setting of electrical rates is the precise type of "regulation of future effect" which lends itself to the protections of the Seattle Administrative Code. If we as a court were to find ratemaking is a rule under the administrative code, ratepayers would be entitled to notice and a hearing on the adoption of the rates, instead of the limited notice and opportunity to comment allowed by the City in this case. This result would insure ratepayers notice and an opportunity to comment on the City's *final* rate design. This opportunity was denied by the City's last minute substitution of a new rate scheme, proposed hours before the public meeting.

Finally, by making the City's decision subject to hearing and comment under the administrative code, the court

would have established a basis for participation which is more consistent with the procedural rights granted in PURPA. I would therefore reverse summary judgment and require the City of Seattle to conform to its own administrative code when engaging in the ratemaking process.

WILLIAMS, C.J., and DORE, J., concur with ROSELLINI, J.

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No. 83-477

IN THE

Supreme Court of the United States

October Term, 1983

EARLE M. JORGENSEN COMPANY, et al.,
Petitioners,

v.

THE CITY OF SEATTLE, WASHINGTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF WASHINGTON

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Washington Supreme Court correctly concluded that the generic right to intervene and participate, provided by Section 121(a) of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 2361(a), does not require a nonregulated electric utility to adopt judicial procedures whenever it considers or establishes electric rates?

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IN THE

Supreme Court of the United States

October Term, 1983

EARLE M. JORGENSEN COMPANY, et al.,
Petitioners,

v.

THE CITY OF SEATTLE, WASHINGTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF WASHINGTON

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Washington Supreme Court in *Earle M. Jorgensen Co. v. Seattle* is reported at 99 Wn.2d 861, 668 P.2d 1328 (1982), and is reprinted in Petitioners' Appendix pages 6a-23a.

STATEMENT OF THE CASE

A concise statement of the case is set forth in the Washington Supreme Court's opinion below, 99 Wn.2d at 863-5 and 873. (Pet. App. pp. 8a-10a and p. 18a.)

SUMMARY OF ARGUMENT

The Washington Supreme Court correctly interpreted the requirements of PURPA. Section 121(a) of PURPA (16

U.S.C. § 2631(a)) provides a generic right of any electric consumer to intervene and participate in any ratemaking proceeding. It does not prescribe any specific procedures that must be adopted by either a State regulatory authority or a nonregulated electric utility, much less the full panoply of judicial safeguards, equivalent to an evidentiary hearing, urged by petitioners.

When it enacted PURPA, Congress did not preempt the field of electric rate regulation. Congress allowed states to continue their substantive regulation in the area on the condition they consider the suggested federal standards. *FERC v. Mississippi*, 456 U.S. 742, 765 (1982). Apart from the specific procedural requirements for considering the suggested federal standards set out in Sections 111, 113 and 114 of PURPA, Congress did not establish any particular procedures that must be adopted to provide the generic "right to intervene and participate" contained in Section 121(a). Indeed, the Conference Committee report discussing the intervention and participation rights provided in Section 121 stated explicitly that "The procedures for the type of intervention are left to State law." H.R. Rep. 95-1750, 2d Sess. 82, *reprinted in* U.S. Code Cong. & Ad. News 7797, 7816.

Contrary to petitioners' contention, the court below did not "eliminate" petitioners' participation in Seattle's ratemaking process. The Washington Supreme Court specifically held that the rights of intervention and participation provided in Section 121(a) of PURPA exists in *any* proceeding. (Pet. App. p. 17a.) The Washington Supreme Court, however, upheld the legislative, rather than judicial, *mode* of participation that Seattle provided.

As a consequence, there is no basis for the Court to grant petitioners' request for review. This Court has consistently maintained the principle expressed in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978) that "Even apart from the Administrative Procedure Act, this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress has confided the responsibility for substantive judgments."

ARGUMENT

1. The Decision Below is Consistent With Decisions of This Court

The ruling below is consistent with this Court's recent decision upholding the constitutional validity of PURPA. *FERC v. Mississippi, supra.* Referring to the procedural requirements in Titles I and III of PURPA that require state commissions (and nonregulated electric utilities) to follow certain notice and comment procedures when acting on the proposed federal standards, the majority opinion concluded that these specific procedural requirements ". . . do not purport to set standards to be followed in all areas of the state commission's endeavors." *Id.*, 456 U.S. at 771.

Section 121(a) of PURPA does not require an evidentiary hearing. Moreover, it does not require a hearing. It merely provides that any electric consumer has a generic right to intervene and participate. The decision of the Washington Supreme Court is therefore likewise consistent with this Court's earlier holdings that even a statutory requirement to conduct a "hearing", without being more specific, does not require a full range of judicial procedures. *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972) and *United States v. Florida East Coast R. Co.*, 410 U.S. 224 (1973).

Seattle did not eliminate participation. It provided a legislative mode of participation. In its 1977 term, this Court upheld similar legislative, rather than judicial, procedures for "participation" in federal rulemaking under Section 4 of Administrative Procedure Act (5 U.S.C. § 553). *Vermont Yankee Nuclear Power Corp. v. NRDC, supra.* In so ruling, the Court noted that it has repeatedly cautioned reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress. *Id.*, 435 U.S. at 525.

2. No Constitutional Question is Raised By the Washington Supreme Court Decision

In contrast to the Federal District Court decision that gave rise to this Court's consideration of PURPA in *FERC v. Mississippi*, the Washington Supreme Court did not question the constitutional validity of Section 121(a) of PURPA. The decision specifically declared that "the right of intervention and participation exists in *any* proceeding" (Pet. App. p. 17a, emphasis by the court).

The Washington Supreme Court did not rule that the generic right to intervene and participate requires that every rate making proceeding of a nonregulated utility be thereby transformed into an adjudicatory proceeding with a full panoply of judicial safeguards (Pet. App. p. 18a). It is only if petitioners' exaggerated view of Section 121(a) were to be endorsed that this Court would be confronted with reopening the inquiry into the constitutional validity of PURPA just concluded in *FERC v. Mississippi*.

3. There Is No Conflict Among the State Courts or Among the Circuits

As far as respondent is aware, *Earle M. Jorgensen Co. v. Seattle*, is the only case so far decided by a State Court of last resort or by a Federal Circuit Court that has specifically ruled on the generic right to intervene and participate provided in Section 121(a) of PURPA. Thus, there is no conflict among either State Courts or Federal Circuits Courts that this Court may resolve.

The Washington Supreme Court decision, moreover, is consistent with the interpretation of Section 121(a) expressed by the one United States District Court that appears to have touched on the issue. *City of Pittsburgh v. Pennsylvania P.U.C.*, 512 F. Supp. 1117 (W.D. Pa. 1981). In that case, the District Court rejected Pittsburgh's claim for production of transcripts based on its failure to meet the jurisdictional requirement under 16 U.S.C. § 2633 that a State Court must first have denied plaintiff's right to intervene and participate.

In the course of dismissing the plaintiff's claims, the Court noted the lack of specific procedural requirements in Section 121(a):

> There is, furthermore, no support for Plaintiffs' assertion that receiving "timely transcripts" is recognized as part of the "rights of participation" under PURPA, since rights of participation are contained in one section, § 2631, and another section, § 2632(c), deals with transcripts. It is clear that had Congress intended that any rights to receive transcripts be part of rights of participation, they would appear in the same section.

Id., 512 F. Supp. at 1120.

This interpretation by a Federal District Court stands in harmony with the Washington Supreme Court's determination that Section 121(a) does not dictate any particular procedures by merely providing any electric consumer with the right to intervene and participate.

4. The Washington Supreme Court Decision Preserves the Long Recognized Distinction Between Privately and Publically Owned Utilities

The decision of the Washington Supreme Court affirmed that under State law in Washington, municipal electric utilities are not regulated by the Washington Utilities and Transportation Commission and that the municipality owning the utility has "full authority" to set rates through legislative action. (Pet. App. pp. 11a-13a.)

This Court itself has long recognized and upheld the distinction between private utilities regulated by State utility commissions and public utilities having the authority to set rates by legislation. *Springfield Gas & Elec. Co. v. Springfield*, 257 U.S. 66 (1921). Writing for the Court in *Springfield*, Justice Holmes sustained the public policy behind the distinction:

> The plaintiff's argument, shortly stated, is that, in selling electricity, the city stands like any other party engaged in a commercial enterprise, and that to leave it free in the matter of charges while the plaintiff is subject to the public utilities board is to deny to the plaintiff the

> equal protection of the laws. But we agree with the supreme court of the state that the difference between the two types of corporation warrants the different treatment that they received.
>
> The private corporation, whatever its public duties, is organized for private ends, and may be presumed to intend to make whatever profit the business will allow. The municipal corporation is allowed to go into the business only on the theory that thereby the public welfare will be subserved. So far as gain is an object, it is a gain to a public body, and must be used for public ends. Those who manage the work cannot lawfully make private profit their aim, as the plaintiff's directors not only may but must.

Id., 257 U.S. at 69-70.

In response to a recent challenge to rate setting by a public utility district, the Washington Supreme Court likewise outlined the rationale for providing publically owned utilities the authority to conduct independent rate making proceedings. *Snohomish Cty. PUD 1 v. Broadview Television*, 91 Wn.2d 3, 586 P.2d 851 (1978). Justice Rosellini (the author of the dissent in the *Jorgensen* case below), on behalf of a unanimous Washington Supreme Court, reasoned as follows:

> We should observe in passing that we do not think the legislature, in exempting public utility districts from the control of the Utilities and Transportation Commission and giving them plenary authority to set rates and charges, was manifesting a disregard for the interests and rights of customers such utilities. Rather, it would appear that it had in mind the nature of such utilities, which are formed by the voters of the district and whose commissioners are likewise elected. RCW 54.08. The facts that the district is publicly owned and operated and that it has no profit motive offer reasonable assurance that excessive charges for utility services will not be imposed.

Id., 91 Wn.2d at 8-9 (footnote omitted).

PURPA itself recognizes that there are electric utilities throughout the United States whose rates are not regulated by a State regulatory authority. Section 3(9) of PURPA (16 U.S.C. § 2602(9)) defines the term "nonregulated

electric utility" to mean "any electric utility other than a State regulated electric utility."

It would be quite extraordinary then to conclude that, by providing a generic right to intervene and participate in rate making proceedings of a nonregulated utility, Congress meant to mandate a wholesale transformation in the procedures traditionally employed by nonregulated utilities. Even the dissent in the case below did not conclude that the right of intervention and participation required any particular judicial procedures. The dissent agreed with the majority that State law should determine the right of intervention but argued that the particular State law that should be applied here was Seattle's administrative code. (Pet. App. p. 22a.) Even if this last leap in reasoning could be accepted, the majority pointed out that Seattle's administrative code could have limited public participation to written presentations (Pet. App. p. 19a).

Petitioners go farther than the dissent below and urge this Court to consider the argument that their right to participate in Seattle's rate making proceedings was "eliminated" because they were not guaranteed a judicial rather than a legislative proceeding (Pet. pp. 5-6). Petitioners urge this Court to consider whether Section 121(a) of PURPA specifically requires:

> [A] city council, acting as the rate-making authority for a nonregulated electric utility, to give ratepayers notice of rate proposals when requested; to permit ratepayers to appear, to speak, and to provide expert testimony during consideration of rate proposals; and to permit ratepayers to cross-examine witnesses proposing specific rates, priniciples of rate allocation, or specific rate designs during a rate proceeding in order to contribute toward achieving the purposes of PURPA?

(Pet. (i)).

Yet, the procedural requirements that petitioners urge this Court to consider reading into Section 121(a) of PURPA are equivalent to what is defined in PURPA as an "evidentiary hearing":

> (6) The term "evidentiary hearing" means—
>
> (A) in the case of a State agency, a proceeding which (i) is open to the public, (ii) includes notice to participants and an opportunity for such participants to present direct and rebuttal evidence and to cross-examine witnesses, (iii) includes a written decision, based upon evidence appearing in a written record of the proceeding, and (iv) is subject to judicial review; [PURPA § 3(6)(A), 16 USC § 2602(6)(A)]

PURPA, however, requires that an "evidentiary hearing" be held in only two instances: (1) when considering life line rates under Section 114 (16 U.S.C. § 2624(b)) and (2) when an automatic adjustment clause is adopted and the special rules of Section 115 (16 U.S.C. § 2625(e)(1)(A)) take effect. In contrast, even the prescribed procedures for considering the mandatory federal standards under Sections 111 and 113 (16 U.S.C. §§ 2621 and 2623) require only a "hearing", not an "evidentiary hearing".

Given the specific definition of "evidentiary hearing" in PURPA and the limited circumstances under which an evidentiary hearing must be conducted, it is highly improbable that Congress meant to dictate the use of equivalent, judicial procedures by nonregulated electric utilities in every ratemaking proceeding simply by affirming every customer's "right to intervene and participate".

5. The Washington Supreme Court Did Not Eliminate Ratepayer Participation Nor Did It Eliminate Petitioners' Ability to Seek Procedural Change Through Legislation

Petitioners' right to intervene and participate in ratemaking proceedings was affirmed in the decision below. (Pet. App. p. 17a.) Petitioners did participate in ratemaking proceedings conducted by Seattle leading to the enactment of the challenged ordinance. (Pet. App. pp. 8a-9a.) These proceedings

encompassed a typical legislative process, supplemented by a specially created Citizens' Rate Advisory Committee.

Seattle also conducted the evidentiary hearing required in the consideration of life line rates under Section 114 of PURPA and the hearings required in the mandatory consideration of federal standards under Sections 111 and 113 of PURPA. (Pet. App. p. 18a.) Despite their professed interest in PURPA, and despite the fact that these proceedings dealt directly with PURPA standards, none of the petitioners participated in any of these proceedings. (Pet. App. p. 18a.)

It is indeed odd, therefore, that petitioners should support their petition by arguing that the problems of ratepayers served by nonregulated utilities in the Pacific Northwest "should not be 'exacerbated by the rate structures employed by most utilities'" (Pet. p. 7, quoting from *FERC v. Mississippi*, *supra*, 456 U.S. at 756. The "exacerbating rate structures" cited by this Court in *FERC v. Mississippi*, referred to the prevalence of declining block rates noted in S. Rep. No. 95-442 at 26, *reprinted in* U.S. Code Cong. & Ad. News 7903, 7923. *Id.* 456 U.S. at 756. The problem of declining block rates, however, was precisely the issue that PURPA addressed in the mandatory "declining block rates" standard required to be considered by every nonregulated electric utility, as well as every State regulatory authority, under Section 111(d)(2) of PURPA (16 U.S.C. § 2621(d)(2)). While its label may be misleading, the "declining block rates" standard actually calls for the *elimination* of unjustified declining block rates. It was the declining block rates standard, among other Section 111 standards, that Seattle considered in hearings on April 29 and May 5, 1980. (Pet. App. p. 18a.) In fact, Seattle not only considered but adopted the declining block rates standard. Seattle Ordinance 109160, enacted June 30, 1980. It was this same set of hearings on the declining block rates standard that formed one of the mandated PURPA proceedings in which petitioners did not even bother to participate.

If petitioners are dissatisfied with the *mode* of participation provided by Seattle and other nonregulated electric utilities, they have recourse to a number of legislative sources for relief. They can request Seattle and all other nonregulated utilities to adopt judicial procedures on their own. They can request the Washington Legislature to put Seattle and all other publically owned utilities in Washington under the regulatory control of the State Utilities and Transportation Commission. In the alternative, they can request the Legislature to require that Seattle and all other publically owned utilities adopt specific judicial procedures in ratemaking proceedings. They can petition Congress to amend PURPA and require nonregulated electric utilities to conduct evidentiary hearings in all ratemaking proceedings. They can even petition Congress to totally preempt the field of electric rate regulation and to further require that Federal electric rate setting go beyond the Administrative Procedure Act to provide a full panoply of judicial safeguards. They cannot, however, claim that Seattle denied them a legislative mode of participation.

CONCLUSION

Congress set out specific procedural requirements for considering the suggested federal standards in Sections 111, 113 and 114 of PURPA. Congress did not specify any particular procedures when it provided a generic "right to intervene and participate" within Section 121(a) of PURPA. The principle expressed by this Court in *Vermont Yankee Nuclear Power Corp. v. NRDC, supra*, 435 U.S. at 524 therefore applies:

> Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare.

This petition does not present such a rare circumstance. The electric rates ultimately enacted in Ordinance 109218 at the conclusion of Seattle's legislative ratemaking process were held by the trial court below not to be unfair, unjust, or unreasonable. (Pet. App. p. 9a.) The trial court further held that the City did not act arbitrarily or capriciously in enacting the rate ordinance and that the methodology employed by the City in establishing the rate increase was not fundamentally erroneous. (Pet. App. pp. 9a-10a.) The petitioners did not appeal.

The petition for writ of certiorari should be denied.

Respectfully submitted this 18th day of October, 1983.

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v.

THE CITY OF SEATTLE, WASHINGTON
Respondent.

On Writ Of Certiorari
To The Supreme Court Of
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PETITIONER'S REPLY MEMORANDUM

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OCTOBER TERM, 1983

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v.

THE CITY OF SEATTLE, WASHINGTON,
Respondent

On Petition For Writ of Certiorari To The Supreme Court Of The State Of Washington

PETITIONER'S REPLY MEMORANDUM

1. Section 121(a) of PURPA requires that affected ratepayers be granted the right to "intervene" as well as the right to "participate" in nonregulated utilities' rate proceedings, neither of which requirement is satisfied by providing only passive observation of the public meetings of a legislative body.

The City argues that the requirements imposed by Section 121(a) of PURPA are met by providing what is characterized as a "legislative mode of participation" (Br.Resp.pp. 2,3,10). The court below, in describing this "legislative mode of participation", acknowledged that "(g)enerally, we have not imposed procedural requirements upon legislative decisions" (Pet. App.p.13a), and found the

only procedural limit imposed by state law on the operation of the legislative process to be a requirement that persons be allowed the passive right to "attend and participate in public meetings of the city council. R.C.W. 35.24.180."(Pet.App.p.15a)[1]

It is impossible to reconcile the City's position with the comment of the Congressional conferees that the intervention and participation provisions of PURPA were adopted "in recognition of the reliance they place on intervention and participation in these proceedings to further the purposes of this title.[2] Indeed, it is difficult to imagine why Congress would have bothered to "extend" federal protection to the right of passive observation of the legislative process, since such passive observation alone neither significantly advances the purposes of PURPA, nor appears to need Congressional protection.[3]

The City also cites *Vermont Yankee Nuclear Power Corp. V. NRDC*, 435 U.S. 519 (1978), as upholding "similar legislative, rather than judicial, procedures for 'participation'[4] in federal rulemaking under Section 4 of (sic) Administrative Procedure Act (5 U.S.C. §533)" (BR.Resp. p.3). It is useless to discuss the meaning of the term, "participation", in isolation from its conjunctive "intervene", for Congress afforded affected ratepayers the opportunity to intervene

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[1] Quoting from *King Cy. Water Dist. 54 v. King Cy. Boundary Review Bd.*, 87 Wn.2d 536, 546, 554 P.2d 1060 (1976). R.C.W. 35.24.180 merely provided in relevant part that "All meetings of the city council must be public."

[2] H.R.CONF.REP. NO.95-1750, 95TH Cong., 2nd Sess. 81, *reprinted in* 1978 U.S.CODE CONG. & AD. NEWS 7797, 7815.

[3] *See generally, Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586 (BRENNAN, J., concurring). *See also* note 1, *supra*.

[4] Neither Section 4 of the Administrative Procedure Act (5 U.S.C. §553) nor *Vermont Yankee* discusses the meaning of the term, "participation". The relevance of these authorities to this case appears to depend upon the acceptance of the respondent's unstated conclusion that they somehow provide a federal definition of the term "participation".

as well as participate "as a matter of right",[5] in rate proceedings. The term, "intervene" has a clear meaning in federal procedure.[6] Even more important, the term has been used frequently by Congress in recent years, almost always to connote the right of participation in a judicial type of proceeding.[7]

2. PURPA does not purport to preserve a distinction between privately and publicly owned utilities.

The City argues that the Washington State Supreme Court has acted to preserve "the distinction between private utilities regulated by State utility commissions and public utilities having the authority to set rates by legislation" (Br.Resp. p.5). However, PURPA ignores any classification of utilities based on ownership. The Act instead seeks to include all utilities within its scope, and classifies utilities only on the basis of whether they are "regulated" or "unregulated"[8]. The term "unregulated" is not congruent in application with the term "publicly owned,"[9] a fact which must have been known to Congress when enacting PURPA. Whatever value the distinction between public and private ownership of utilities retains for other purposes, it is clear that a classification based on ownership plays no such important roll in PURPA.

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[5] 16 U.S.C. §2631(a).

[6] *See, e.g.*, FED.R.CIV.P.24, allowing any qualified person to "intervene" in federal litigation.

[7] *See, e.g.*, Indian Child Welfare Act of 1978, P.L. 95-608, §101(c), 92 Stat. 3071, codified at 25 U.S.C. §1911(c)(right granted to Indian child, its custodian or guardian); Surface Mining Control and Reclamation Act of 1977, P.L. 95-87, §520(c)(2), 91 Stat. 503, codified at 30 U.S.C. §1270(c)(2) (right granted to the Secretary of Interior);

[8] 16 U.S.C. §2602.

[9] Indeed, this Court just last term upheld assertion of state regulatory jurisdiction over one form of just such a "public" utility. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm.*, ___U.S.___, *103 S. Ct. 1905, 76 L.Ed.2d 1 (1983).*

CONCLUSION

For the reasons stated in the petition for writ of certiorari, and in this reply, a writ should issue to review the judgment and opinion of the Washington State Supreme Court.

Respectfully submitted this 28th day of October, 1983.

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